***United States Court of Appeals***

***for the Second Circuit***

# PETITION FOR REHEARING EN BANC

# 74-1551
# 74-1605

## United States Court of Appeals
### For the Second Circuit

PETER F. CLARK, as President of Ice Cream Drivers and Employees Union Local 757, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, an unincorporated association, ANTHONY IORIO, as President of Milk Drivers and Dairy Employees Union Local 680, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, an unincorporated association, PETER F. CLARK, EMANUEL PARISH, ANTHONY CARLINO, RICHARD MASCUCH, ANTHONY IORIO and EDWARD HUTNIK, as Trustees of and on behalf of all of the Trustees of Ice Cream Employees Union Pension Fund, a pension trust fund,

*Plaintiffs-Appellees-Appellants,*

*against*

KRAFTCO CORPORATION,

*Defendant-Appellant-Appellee.*

## PETITION OF KRAFTCO CORPORATION FOR REHEARING OR, ALTERNATIVELY, FOR REHEARING IN BANC


SULLIVAN & CROMWELL
*Attorneys for Defendant-Appellant-Appellee Kraftco Corporation*
48 Wall Street
New York, N. Y. 10005

JOHN F. CANNON
*of Counsel*


February 28, 1975

# United States Court of Appeals

**For the Second Circuit**

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PETER F. CLARK, as President etc., *et al.*,

*Plaintiffs-Appellees-Appellants,*

*against*

KRAFTCO CORPORATION,

*Defendant-Appellant-Appellee.*

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## PETITION OF KRAFTCO CORPORATION FOR REHEARING OR, ALTERNATIVELY, FOR REHEARING IN BANC

Kraftco Corporation respectfully petitions this Court pursuant to Rules 35 and 40, FRAP, for a rehearing, or for a rehearing in banc, of the decision dated February 6, 1975,* insofar as that decision (Slip op. 1689-1701).

> (1) reverses the holdings of Judge Tyler and Judge Lumbard and treats the Breyer Agreement's provision for the performance of a final and binding *actuarial* study by designated *actuarial* consultants of the consequences to a specific pension fund of a *described future event*—"the discontinuance of operations and the termination of the employees"—as if it provided for an arbitration, despite this Court's own earlier holding that "The contract does not provide for arbitration and neither party re-

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* By order dated February 20, 1975 the Court enlarged Kraftco's time for the filing of this Petition to February 28, 1975.

quested it'' (*Clark* v. *Kraftco Corporation,* 447 F.2d 933 (1971)),

(2) increases Kraftco's liability by $401,400 by binding it to the results of an actuarial study which Judges Tyler and Lumbard found, *and the actuarial consultants conceded,* went beyond the consequences of the described *future* event and, to the extent of said $401,400, called upon Kraftco to pay for the consequences of *past* events, and

(3) affirms, without comment of any kind, Judge Lumbard's failure to grant Kraftco a hearing on its claim that it should not be required to pay anything on account of the presumed consequences to the pension fund of the discontinuance of a distribution operation that was *not in fact discontinued.*

The decision is of unusual interest and importance because it holds that a professional actuarial consulting corporation had the power to bind Kraftco to what the Judges below found, and this Court does not gainsay, was an *ex parte,* egregiously erroneous, alleged interpretation of non-technical contract language, and for no legal reason other than that the other parties to the contract were labor organizations.

## I.

When Judge Tyler denied the Unions' motion for summary judgment he said that since Kraftco was not ''charging fraud or misconduct but gross error,'' there was ''little question that were the Segal determination the product of an arbitral proceeding, it would be entitled to confirmation'' (323 F. Supp. at 360). But he held that the Breyer Agreement did not provide for arbitration. He took it for

what it is on its face: an agreement to retain a professional actuarial consulting corporation to make a final and binding actuarial study of the consequences to the Ice Cream Industry Pension Fund of the scheduled cessation of production at one plant of one employer. He found nothing—because there was nothing—in the text or context of the Breyer Agreement to justify the inference that the Segal Company had been so retained for any purpose other than to apply its actuarial expertise:

> ". . . it was not intended thereby to submit to Segal & Co. a problem of interpretation which exceeds the traditional scope and expertise of an actuary" (323 F. Supp. at 363).

In arguing to this Court in 1971 that Judge Tyler's order was final and appealable, the Unions contended that by vacating and remanding the matter to the actuarial consultants pursuant to Article 76, NYCPLR, Judge Tyler had reformed the contract and had compelled arbitration. This Court said then:

> "As to the first argument, the Locals assume that Judge Tyler's order can properly be regarded as though it were an order compelling arbitration [footnote omitted]. This is by no means clear. *The contract does not provide for arbitration* and neither party requested it. . . ." (447 F.2d at 934-35; emphasis added)

After trial, Judge Lumbard held that the parties' agreement that the decision of the actuarial consultants would be "final and binding" meant that "matters of actuarial expertise are not open to judicial review" (85 LRRM at 3040, fn.). But, with the full facts before him, including the Segal Company's extensive analysis of the matter, he

found that the problem of interpretation presented by the Breyer Agreement was not one which yielded to actuarial expertise (*id.*, at 3032).

The Court's decision acknowledges that the Breyer Agreement presents a problem of interpretation—"The precise meaning of the language of the contract had given rise to conflicting assessments of Kraftco's possible liability" (Slip op. 1691)—but does not deal with, much less reverse Judge Lumbard's finding that its meaning does not yield to actuarial expertise. Quite inconsistently with its earlier statement that the Breyer Agreement "does not provide for arbitration", it cites to the *Steelworkers Trilogy*, recites that the courts do not interfere where the parties have bargained for an arbitrator's construction of language, and claims that the Breyer Agreement "specifically stated that the decision of *the arbitrator* was to be final and binding" (Slip op. 1700-01; emphasis added).

It thus entirely begs the questions presented:

> —Is the problem of interpretation one which is within an actuary's expertise?
>
> —If not, did the parties give a corporate actuarial consulting firm an arbitrator's power—free of the procedural requirements that operate to restrain arbitral power—to come to a patently erroneous resolution of the problem?

The fact that the parties were represented by able and highly qualified persons (Slip op. 1692, 1701) does not alter the fact that their agreement does present a problem of contract interpretation. Nor does the *Steelworkers Trilogy* absolve this Court of its responsibility to confront the finding of Judges Tyler and Lumbard, with which the Segal Company agreed, that the problem of interpretation pre-

sented is not resolvable as a matter of actuarial practice (35 LRRM at 3032). In *Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564, 567-68 (1960), the Court said, "The function of the court is very limited when the parties *have agreed* to submit *all questions of contract interpretation* to the arbitrator" (emphasis added). Here there is no language submitting non-actuarial questions of interpretation to the actuary. That no one realized the language raised such a question does not imply a delegation of power to the actuarial firm to resolve it erroneously and *ex parte*. *Steelworkers* v. *Warrior & Gulf Co.*, 363 U.S. 574 (1960), held that even in arbitration the courts must decide whether or not the parties "did agree to give the arbitrator the power to make the award he made" (at 582), and that a party who claims that the arbitrator was given the power to determine the scope of his own authority bears the burden of a clear demonstration of that purpose (at 583, footnote).

More of a rationale than the mere fact that this is a contract "between an employer and a labor organization" (LRMA, Section 301(a), 29 U.S.C. § 185(a)) is required for a decision that allows an actuarial consulting firm, retained as such, to fasten an additional liability upon the employer by acting in a way totally inconsistent with the plain meaning of non-technical words describing its charge.

## II.

The Breyer Agreement engaged the Segal Company to make an actuarial study of the consequences to the Pension Fund of "the discontinuance of operations and the termination of the employees" at Krafteo's Newark ice cream plant. It is the "precise meaning" of this language of the contract which gives "rise to conflicting assessments of Krafteo's possible liability" (Slip op. 1691).

For all 16 years of the Pension Fund's history the collective bargaining agreements between the Unions and the Employers (including Kraftco) required that contributions* be made on the basis of days worked by their employees, irrespective of the fact that, due to differences in age, service and turnover, the employees of each Employer necessarily contributed to the actuarial cost of the pension system in different degrees. This was the parties' basic "pooled risk" agreement, and it was renewed in the collective bargaining agreement reached a few days after the Breyer Agreement was signed.

If the phrase "the discontinuance of operations and the termination of the employees" means that the parties were concerned only with the effect upon the Pension Fund of the loss of the employees who would be laid off when Newark production closed, the actuarial effect according to the Segal Company is $135,100. If in addition the parties were concerned with a presumed loss of the contributions (net of the benefit costs) that otherwise would have been paid (and would have accrued) in respect of all future generations of the Newark production employees' replacements, the actuarial effect according to the Segal Company is $576,700.**

The $401,400 which the Court's decision would add to Kraftco's $576,700 liability as determined by Judge Lumbard, is in no sense a measure of the consequences of the Newark closing. Rather, it reverses the consequences of the preceding 16 year history of the Pension Fund and

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* The Trust Agreement did not obligate Employers to make contributions; the collective bargaining agreements were the sole source of such obligations (Slip op. 1691).

** If the Breyer Agreement had not been misconstrued in another respect, this amount would be lower. See III, below, page 9.

*in the actuary's own words,* "deprive[s] Kraftco of the advantages already accrued to it in the past by virtue of its participation in a pooled-risk fund." If the Newark plant had stayed open and the Pension Fund continued *for all eternity,* this previously accrued advantage would not have increased Kraftco's contribution obligations *by a red cent.* Why the Segal Company went down this road cannot be explained, but it was taken down the road by an employee *who was not an actuary.* In Judge Tyler's words:

> "Indeed, the company has made a strong showing that the actuaries gave virtually no attention to the problem of interpreting their charge" (323 F. Supp. at 363).

The decision refuses to address itself to the question how Kraftco can justly be made to pay the consequences of *past* events when it only agreed to pay the *future* consequences of a *future* event. The decision explains away the entire record on the theory that Judge Tyler was led by a forensic device into reliance upon evidence of Kraftco's subjective intent to discern an ambiguity where none existed, and that the statements of the Segal Company's Chief Actuary upon the redetermination and Judge Lumbard upon the trial were somehow invalidated by Judge Tyler's seminal error (Slip op. 1696-97, 1699).

With all due respect, this is patently unfair:

(1) Since evidence of subjective intent is relevant if ambiguity is not objectively resolvable (RESTATEMENT OF CONTRACTS § 71), Kraftco need not apologize for its proffer in response to a motion for summary judgment. But the important point is that one will search Judge Tyler's opinion in vain for any evidence of reliance by him upon any representations by Kraftco as to its state of mind (Slip op. 1695).

(2) Judge Tyler relied explicitly upon the deposition of the Segal Company's Chief Actuary and the affidavit of Kraftco's actuary (323 F. Supp. at 363). On the basis of what they said the problem of interpretation, and the egregiously erroneous nature of the Segal Company's original determination, became manifest. If Judge Tyler was wrong in failing to terminate all inquiry when he read the words "final and binding", then Judge Mansfield was also wrong when he defined an ambiguous phrase as, ". . . one capable of more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement and who is cognizant of the customs, practices, usages and terminology as generally understood in the particular trade or business". *Eskimo Pie Corporation* v. *Whitelawn Dairies, Inc.*, 249 F. Supp. 987, 994 (S.D.N.Y. 1968).

(3) The Court's decision ignores the Segal Company's redetermination on the theory that only because of Judge Tyler's error was its new calculation different from the first one (Slip op. 1700). But the Court does not say how this justifies disregarding what its Chief Actuary said, namely that: (i) without interpretation of the meaning of the agreement no calculation of any kind would be possible, (ii) the calculation first made deprived "Kraftco of the advantages already accrued to it in the past by virtue of its participation in a pooled-risk fund" and (iii) as to whether or not such deprivation had been agreed to here, the Breyer Agreement "does not provide explicit guidance for the resolution of this particular issue".

(4) Contrary to the decision's implications (Slip op. 1696-97), Judge Lumbard did not follow Judge Tyler's findings and conclusions for law of the case reasons. His Opinion and Order shows that he considered "all the evidence introduced at trial concerning the origins of the

Breyer agreement," found that there were not "any grounds which might justify setting aside Judge Tyler's prior holding," and found on the merits himself that the Breyer Agreement was ambiguous and misconstrued by the Segal Company in the first instance (35 LRRM at 3035, 3038-39). Judge Lumbard's opinion is likewise devoid of any indication that Kraftco's subjective intent played any part in his decision; at trial he *refused to receive* the evidence of subjective intent which Kraftco proffered.

## III.

The Court's decision is altogether silent on Kraftco's contention that it was entitled to a hearing below on the question whether the Segal Company went beyond its power under the Breyer Agreement by assessing Kraftco for presumed consequences of the discontinuance of the Newark *distribution* operation when, in fact, only production was discontinued, distribution having been transferred (Slip op. 1690-93).

On its appeal, Kraftco necessarily argued this contention in the context of Judge Lumbard's entry of a $576,700 judgment based upon the so-called alternate interpretation of the Breyer Agreement. But the Segal Company committed the same error in the original determination and Kraftco raised the point in its papers in opposition to summary judgment (83a). This error was one of the errors to which this Court had reference in 1971 when it said:

> ". . . Even were we to reverse Judge Tyler's order, we could not grant full relief to the Locals because Kraftco raises the issue, not passed upon by Judge Tyler, that under the Locals' theory, the consultant's report contains clear errors totaling as much as $500,000." (447 F.2d at 936 (footnote omitted))

Kraftco has never had a hearing on this point.

It cannot seriously be contended, whatever interpretative powers Segal Company was given, that Kraftco should be required to pay the "impact" of the discontinuance of an operation that was never discontinued. The failure of the District Court and this Court to grant such a hearing is a denial to Kraftco of rights of constitutional significance.

## CONCLUSION

Kraftco continues to maintain that a proper interpretation of the Breyer Agreement would limit the plaintiffs' recovery to $135,100. For purposes of this petition, however, it only contends (1) that no interpretation, either of the scope of the actuarial consultants' authority or of the event whose consequences they were to study, justifies the entry of a $978,100 judgment and (2) that a hearing is required on Kraftco's contention that the judgment should have been reduced to correct the consequences of the Segal Company's having predicated its original and alternate calculations on the erroneous factual assumption that distribution operations had been discontinued.

The petition for rehearing, or rehearing in banc, should be granted and judgment entered accordingly.

Respectfully submitted,

SULLIVAN & CROMWELL
*Attorneys for Defendant-Appellant-Appellee Kraftco Corporation*
48 Wall Street
New York, N. Y. 10005
Telephone (212) 952-8100

JOHN F. CANNON,
*of Counsel.*

February 28, 1975